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Jonathan F. Duncan

Kristina V. Giddings

WHICH WASHINGTON: CONSTITUTIONS IN CONFLICT?

AN ANALYSIS OF *YORK V. WAHKIAKUM SCHOOL DISTRICT* AND ITS POTENTIAL EFFECT ON SCHOOL DRUG TESTING POLICIES IN OTHER STATES

JONATHAN F. DUNCAN*
&
KRISTINA V. GIDDINGS**

I. INTRODUCTION

Drug testing in interscholastic athletics presents a familiar tension. On one hand, the dangers and downsides of doping by high school student-athletes is, by most accounts, beyond debate. Accordingly, secondary schools obviously have an interest in minimizing the use and abuse of performance-enhancing substances by students. On the other hand, a student who also chooses to be an athlete does not thereby sacrifice his or her basic privacy interest. Complicating this familiar tension is a legal system that provides varying degrees of protection against government intrusion, depending on where a student-athlete lives and competes.

From our nation's capital, the U.S. Constitution protects citizens from unreasonable searches, including drug tests, and seizures.[1] A large body and long history of jurisprudence sheds light on the intricacies of the Fourth Amendment. Outside of Washington, D.C., however, state constitutions throughout the union also protect citizens from unwarranted government intrusion. At least some state constitutions, like the one in the State of

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* Jonathan is a partner at Spencer Fane Britt & Browne LLP in Kansas City, Missouri. His practice focuses on education law and sports litigation. He also has extensive experience handling all types of employment-related issues, including litigation and human resources counseling. In addition to his co-author, Jonathan would like to thank Robert C. Giddings, third year law student at Duke University, for his research assistance.

** Kristina is an associate at Spencer Fane Britt & Browne LLP in Kansas City, Missouri. She concentrates her practice in the areas of education, special education, and intercollegiate sports.

1. *See* U.S. CONST. amend. IV.

Washington, provide different and greater protections than those found in the Fourth Amendment of the U.S. Constitution.[2] One recent case highlights how differences between and among constitutions can yield different results for challenged drug testing programs in secondary schools.[3]

In this article, we analyze federal jurisprudence interpreting the Fourth Amendment in the context of drug testing student-athletes in public secondary schools. In the last thirteen years, the U.S. Supreme Court has twice upheld drug testing of secondary students.[4] We will then analyze a recent and splintered decision in which the Supreme Court of Washington distinguished federal authority and struck down a school district's testing policy for student-athletes.[5] We conclude by exploring the impact of conflicting constitutions on efforts to curb use of performance-enhancing drugs in athletics.

II. DRUG TESTING IN THE LAW – STUDENTS AND STUDENT-ATHLETES

The Fourth Amendment of the U.S. Constitution provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[6]

This provision, of course, has been the subject of much litigation and writing. With regard to drug testing in secondary schools, some of the litigation and writing surround efforts to test a school's general student population. Those instances are not part of this discussion. Other cases, more pertinent here, focus on drug testing high school students who choose to participate in extracurricular activities, such as interscholastic sports.[7]

Undoubtedly, drug testing by a public school district constitutes a "search" within the meaning of the Fourth Amendment.[8] Indeed, it seems unlikely that a drug test that, by its very nature, requires a student-athlete to submit a bodily fluid to someone acting at the behest of a government agency to examine what

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2. *Compare* WASH. CONST. art. 1, § 7, *with* U.S. CONST. amend. IV.

3. *See* York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995 (Wash. 2008).

4. *See* Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

5. *See York*, 178 P.3d 995.

6. U.S. CONST. amend. IV.

7. *See generally Earls*, 536 U.S. 822; *Acton*, 515 U.S. 646.

8. *Acton*, 515 U.S. at 652; *see generally Earls*, 532 U.S. 822.

substances the student consumed, can be considered anything but a search. Because the tests are administered without a warrant, challenges to drug testing policies have historically turned on whether policies constitute an "unreasonable search."[9] As a result, to pass muster under federal law, any warrantless search must be conducted in a way that is not unreasonable.

As mentioned in the preceding section, in the last thirteen years, the U.S. Supreme Court examined two drug testing policies implemented by public school districts and upheld the constitutionality of both policies, finding them to be reasonable searches and, therefore, permissible under the Fourth Amendment.[10] In examining student drug testing policies for reasonableness, the U.S. Supreme Court pointed to various factors that supported a finding of reasonableness.[11] A brief description of the policies challenged in each case is below, as well as a summary of the Court's rationale in upholding the policies.

A. Vernonia School District v. Acton[12]

In the first case, *Vernonia School District v. Acton*, the Supreme Court, in a six to three decision written by Justice Scalia, upheld the District's student drug testing policy, finding it reasonable for several reasons.[13]

Under the policy instituted by the Vernonia School District in Oregon, all students who wished to play sports (and those students' parents) were required to sign forms consenting to drug testing of the students.[14] Each of those students was tested by urinalysis at the beginning of the season of any sport in which he or she participated.[15] Additionally, student-athletes' names were placed into a "pool" from which the names of ten percent of the athletes were selected for random drug testing each week.[16] Whenever possible, the student-athletes selected were notified and tested the same day their name was drawn from the "pool."[17] Under the policy, the District went to great lengths to ensure the accuracy of the testing, protect the chain of custody of a student-athlete's urine sample, and limit the number of people who knew the results of the tests.[18]

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9. *See Earls*, 536 U.S. at 828; *Acton*, 515 U.S. at 652-53.
10. *Earls*, 536 U.S. at 825; *Acton*, 515 U.S. at 666.
11. *Earls*, 536 U.S. at 828-38; *Acton*, 515 U.S. at 664-65.
12. *Acton*, 515 U.S. 646.
13. *Id.* at 664-65.
14. *Id.* at 650.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 650-51.

In affirming the constitutionality of this policy, the Supreme Court considered several factors.[19] First, it noted that student-athletes who voluntarily choose to participate in interscholastic athletics have a lower expectation of privacy than students in the general school population.[20] Second, it recognized that public school districts have a legitimate interest in protecting the health and safety of their student-athletes and, therefore, have a compelling interest in deterring drug use.[21] As a result of these findings, the Court supported a contention that, as a threshold matter, a public school district should be able to institute a drug testing policy for student-athletes, so long as the actual policy is reasonable and not overly invasive.[22]

The Court next examined the policy itself.[23] In doing so, it found that, so long as the urinalysis was taken under conditions similar to those typically encountered in public restrooms, the urinalysis was only a negligible intrusion upon student privacy.[24] Additionally, the drug test represented a minimal intrusion on privacy because it was designed to detect only illegal drug use (rather than including tests for alcohol consumption or prescription drug use).[25] Further, the intrusion on student-athlete privacy was minimized because the results were disclosed only to the limited school personnel who needed to know in order to limit athletic participation.[26] Lastly, the consequences of a positive test result were extremely limited because the results were not included in the student's academic or school discipline files and were not revealed to law enforcement officials; instead, student-athletes who tested positive were referred to drug education classes, prohibited from playing sports, or both.[27]

All of these factors, taken together, supported the Court's 1995 decision to find the Vernonia School District's student drug testing policy a reasonable search that is permissible under the Fourth Amendment of the U.S. Constitution.[28]

In a dissent, Justice O'Connor, joined by Justice Stevens and Justice Souter, argued that suspicionless searches such as the random drug testing

19. *Id.* at 652-54.
20. *Id.* at 657.
21. *Id.* at 661.
22. *Id.* at 664-65.
23. *Id.* at 654-55.
24. *Id.* at 658.
25. *Id.*at 658-59
26. *Id.*at 658.
27. *Id.* at 651.
28. *Id.* at 664-65.

policy at issue, are per se unreasonable unless the government can demonstrate that a "suspicion-based regime would be ineffectual."[29] Indeed, the dissent contended that random, suspicionless searches are exactly "what the Framers of the Fourth Amendment most strongly opposed."[30] As a result, Justice O'Connor argued that the suspicionless nature of the District's drug testing policy made it unconstitutional unless the school district could demonstrate that requiring reasonable suspicion would render the policy ineffectual.[31] Further, although Justice O'Connor clearly believed a suspicion-based testing policy would be extremely effective for a school district,[32] the dissent rested on what it considered the majority's fatal failure to account for the Court's long-standing requirement that warrantless searches be based on reasonable suspicion unless requiring such suspicion would result in an ineffective search.[33]

B. Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls[34]

Three years later, citing similar concerns about the prevalence of student drug use, the Tecumseh School District in Tecumseh, Oklahoma, instituted a somewhat broader drug testing policy.[35] Under the Tecumseh policy, all middle and high school students in the district who wished to participate in *any* extracurricular activity were required to consent to urinalysis testing for drugs.[36] Specifically, under one component of the policy, the students were required to submit to drug testing before participating in an extracurricular activity and random drug testing while participating.[37] Under a second component of the policy, students were also subject to testing at any time upon reasonable suspicion.[38]

Believing that the broader nature of this policy made it less reasonable than the Vernonia policy upheld by the Supreme Court, several high school students and their parents challenged the constitutionality of the first component of the Tecumseh policy, specifically alleging that the random

29. *Id.* at 667-68 (O'Connor, J., dissenting).
30. *Id.* at 669.
31. *Id.* at 678.
32. *See id.*
33. *See id.* at 684-86.
34. Bd. of Educ. v. Earls, 536 U.S. 822 (2002).
35. *See id.* at 826.
36. *Id.*
37. *Id.*
38. *Id.*

testing component violated the Fourth Amendment.[39] One of the arguments put forth by the students was that, in order to be reasonable, drug testing policies should require individualized suspicion before a student can be required to submit to the test.[40] In response, a slight majority of the Supreme Court[41] again upheld the policy, finding it reasonable and, therefore, constitutionally permissible.[42]

Engaging in a similar analysis as the one employed in deciding *Acton*, the Supreme Court recognized that many of the factors considered in *Acton* with regard to student-athletes should simply be extended and applied to all students who wish to engage in any type of extracurricular activity.[43] As a threshold matter, the Court found that, like the Vernonia School District, the Tecumseh School District successfully demonstrated a legitimate need for its policy because there was evidence of student drug use at district schools.[44] Further, the Court concluded that "the need to prevent and deter the substantial harm of childhood drug use provid[ed] the necessary immediacy for [the] school testing policy."[45]

In examining the policy itself, the Court found that students who choose to participate in extracurricular activities voluntarily subject themselves to many of the same privacy intrusions that student-athletes do.[46] Further, because extracurricular activities are often subject to stricter regulations than general school activities, participants have a diminished expectation of privacy.[47] In light of these factors and the custodial responsibilities of a public school district, the Court upheld the District's policy and declared that individualized suspicion was not required in school drug testing policies for students engaging in extracurricular activities.[48]

Justice O'Connor's dissent consists of only one paragraph, in which she reiterated her belief that *Acton* was wrongly decided and, because the majority

39. *Id.* at 827 n.2 (stating that the plaintiffs did not challenge the constitutionality of the suspicion-based portion of the policy).

40. *Id.* at 829.

41. *Id.* at 825, 838, 842-55. Justice Thomas authored the five to four majority opinion, in which Justices Rehnquist, Scalia, Kennedy, and Breyer joined. Justice O'Connor, joined by Justice Souter, wrote one dissenting opinion and Justice Ginsburg, joined by Justices Stevens, O'Connor and Souter, wrote a second dissent.

42. *Id.* at 838.

43. *See id.* at 830.

44. *Id.* at 834.

45. *Id.* at 836.

46. *Id.* at 831.

47. *Id.* at 832.

48. *Id.* at 836-38.

decision in *Earls* rested on *Acton*, *Earls* was therefore also wrongly decided.[49] Justice Ginsburg's dissent focused on differences between the drug testing policies in the two cases and argued that the testing program at issue in *Earls* was unreasonable, capricious, and even perverse.[50]

Specifically, this dissent pointed out that, in reaching its decision in *Acton*, the majority emphasized that drug use by student-athletes increased the risk of injuries and that the Vernonia School District's student-athletes were the leaders of an "epidemic" drug culture in the District.[51] The Pottawatomie School District, on the other hand, had admitted that the drug problem in its schools was "not . . . major" and that drug use by students involved in extracurricular activities was not associated with any special dangers.[52]

In drawing additional distinctions between the testing policies at issue in *Acton* and *Earls*, the four-justice dissent explicitly stated that *Acton* "cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them."[53] According to this dissent, the *Acton* court applied a fact-specific balancing test and concluded that, in the particular circumstances at issue in that case, the balance weighed in favor of upholding the constitutionality of the Vernonia School District drug testing policy.[54] In contrast, the dissenters argued that the same balancing test should have yielded a different result in *Earls* because the facts were entirely different, primarily because students involved in extracurricular activities have a higher expectation of privacy than do student-athletes.[55] Overall, a majority of the Supreme Court has made clear that random, suspicionless drug testing of student-athletes does not violate the Fourth Amendment of the U.S. Constitution.[56]

III. SO THE LAW IS SETTLED?

At first blush, another challenge to random drug testing would appear futile in light of the Supreme Court's rulings in Acton[57] and Earls.[58] After all,

49. *Id.* at 842 (O'Connor, J., dissenting).
50. *Id.* at 843 (Ginsburg, J., dissenting).
51. *Id.* (citing Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 649 (1995)).
52. *Id.*
53. *Id.* at 844.
54. *Id.* at 847.
55. *Id.* at 846-47.
56. *See id.* at 822; *see generally* Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).
57. *See generally Acton*, 515 U.S. 646.
58. *See generally Earls*, 536 U.S. 822.

the nation's highest court held not once, but twice, that school officials may drug test students involved in interscholastic athletics or other extracurricular activities.[59] Therefore, when two families challenged a rural Washington school district's drug testing policy the case[60] should have been an easy one, right? Wrong.

In 1994, the small Wahkiakum School District began exploring ideas to curb drug and alcohol use by the student population.[61] The school district, with three buildings and approximately 500 students, is located in Cathlamet, Washington.[62] Cathlamet is situated along the banks of the Columbia River, which separates the State of Washington from the State of Oregon.

The level of drug and alcohol use among students in the public school district was not acceptable to the Wahkiakum Board of Directors and it looked for a remedy.[63] School officials formed the Drug and Alcohol Advisory Committee (Committee) (later renamed the Safe and Drug Free Schools Advisory Committee) to consider prevention programs or strategies.[64] The Committee recommended and the school adopted a number of programs.[65] According to surveys filed by the parties, however, drug and alcohol use in the Wahkiakum School District was still a problem in 1998.[66]

During the summer of 1999, the Committee contemplated and recommended a policy requiring random drug testing of students involved in extracurricular activities.[67] On September 20, 1999, the Board of Directors accepted the Committee's recommendation and voted to adopt Policy 3515.[68] On October 18, 1999, the Board of Directors revised Policy 3515 to cover only those students participating in interscholastic athletics.[69] In fact, Policy 3515 was modeled after the Vernonia School District's policy upheld by the Supreme Court in Acton.[70]

Pursuant to the policy, student-athletes agreed to be drug tested by

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59. *See id.*; *Acton*, 515 U.S. 646.

60. York v. Wahkiakum Sch. Dist., 178 P.3d 995, 997 (Wash. 2008).

61. *Id.* at 998.

62. *Welcome to Wahkiakum*, WELCOMETOWAHKIAKUM.COM, http://www.welcometowahkiakum.com/mules.html (last visited Sept. 28, 2008).

63. *York*, 178 P.3d at 998.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Brief of Appellant at 7, York v. Wahkiakum Sch. Dist., 178 P.3d 995 (Wash. 2008) (No. 78946-1).

69. *Id.*

70. *York*, 178 P.3d at 1000; *see generally* Vernonia Sch. Dist. V. Acton, 515 U.S. 646 (1995).

urinalysis as a condition of participation in athletics.[71] On a weekly basis during the academic year, school officials randomly drew names of one middle school student-athlete and two high school student-athletes.[72] Those selected were driven to the county health clinic and required to provide a urine specimen to county health officials.[73] Although the health officials were near the student-athletes during urination, they did not directly observe the specimen collection.[74] Collected specimens were then sent to a toxicology laboratory for testing.[75] If testing did not reveal the presence of prohibited substances, the school took no further action.[76] In the event of a positive test, the student-athlete was suspended from athletic participation, but not from school.[77] The exact nature or duration of the penalty depended on a variety of factors, including the type of substance detected.[78] In the event of subsequent positive tests, the penalties became more severe.[79]

During the 1999-2000 school year, student-athletes Aaron and Abraham York were tested pursuant to Policy 3515.[80] Similarly, student-athlete Tristan Schneider was tested during the 2000-2001 school year.[81] Represented by the American Civil Liberties Union, the York and Schneider families brought suit against the Wahkiakum School District on December 17, 1999.[82] Specifically, the plaintiffs alleged that Policy 3515 violated article I, section 7 of the Washington Constitution[83] and the Fourth Amendment of the United States Constitution.[84] When the U.S. Supreme Court decided *Earls*[85] in 2002, the plaintiffs abandoned their Fourth Amendment claim.[86] Retaining their claim under the state constitution, the plaintiffs sought an order enjoining

71. *Id.* at 998.

72. *See generally id.*

73. *Id.* at 1021 (Johnson, J., concurring).

74. *Id.* at 998.

75. *Id.*

76. *See id.*

77. *Id.*

78. *Id.*

79. *See id.*

80. *Id.*

81. *Id.*

82. Brief of Appellant at 14, York v. Wahkiakum Sch. Dist., 178 P.3d 995 (Wash. 2008) (No. 78946-1).

83. WASH. CONST. art I, § 7 (providing that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law").

84. *York*, 178 P.3d at 998-99, n.4.

85. *See generally* Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

86. *York*, 178 P.3d at 999, n.4.

enforcement of Policy 3515.[87]

The trial court denied the plaintiffs' request for a preliminary injunction and ultimately ruled in favor of the School District on cross motions for summary judgment.[88] The Washington Supreme Court accepted direct review and heard the case en banc.[89] In light of the authorities discussed above, one might think that the result would be plain and the arguments simple. However, this was not the case.

IV. WARRANTLESS DRUG TESTING IS UNCONSTITUTIONAL IN THE STATE OF WASHINGTON

Rather than an easy case following fresh Supreme Court precedent, the drug test dispute yielded a splintered plurality opinion against the School District.[90] Unlike the U.S. Supreme Court in *Acton* and *Earls*, the Washington Supreme Court struck down the drug testing policy.[91] Although all justices agreed Policy 3515 was unconstitutional in Washington, there was significant disagreement regarding the status of Washington law and the reach of the state constitution.[92]

A. The Plurality Opinion

Justice Sanders delivered the plurality opinion and began his analysis by noting the "strong arguments, policies, and opinions marshaled on both sides" of the drug testing debate.[93] Indeed, the Attorney General for the State of Washington submitted an amicus brief in support of the School District, while the Washington Education Association and the Drug Policy Alliance submitted an amicus brief in support of the families challenging Policy 3515.[94] Rather than camping on policy matters, however, the Court quickly narrowed the legal issue and acknowledged the U.S. Supreme Court's activity in school drug testing cases.[95] The plurality also repeated the material difference in language between article I, section 7 of the Washington

87. *Id.* at 998-99.
88. *Id.*
89. *Id.* at 996, 999.
90. *See id.* at 996.
91. *Id.* at 997.
92. *See id.* at 1006-21.
93. *Id.* at 999.
94. *Id.* at 1012 (Madsen, J., concurring).
95. *Id.* at 999.

Constitution and the Fourth Amendment to the U.S. Constitution.[96] Specifically, the opinion noted that, unlike the U.S. Constitution, the relevant provision of Washington's Constitution does not contain a reasonableness standard. [97] Rather, article I, section 7 simply provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[98] The Fourth Amendment, in contrast, provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[99]

Given the difference in language, passing muster under the U.S. Constitution does not guarantee a like result under the Washington Constitution.[100] While the Fourth Amendment focuses on the reasonableness of a search, article I, section 7 focuses only on whether a search is supported by "authority of law."[101] To determine whether the Washington Constitution provides greater protections than the U.S. Constitution in a particular context, the court must make a two-step analysis.[102] First, the court "must determine whether the state action [at issue] constitutes a disturbance of one's private affairs."[103] Second, the court must determine "whether authority of law justifies the intrusion."[104] "Authority of law" is satisfied when there is a warrant or a "jealously guarded" exception to the warrant requirement.[105]

Following this framework, the plurality opinion first concluded that requiring a student-athlete to provide a urine specimen intrudes into his or her expectation of privacy.[106] The court acknowledged that, in some instances, students have a lower expectation of privacy, but reaffirmed that providing bodily fluids "is a significant intrusion on a student's fundamental right of privacy."[107] Having so concluded, the court turned to analyze whether the school drug tests were conducted with authority of law.[108]

Because the drug tests were not conducted pursuant to a warrant, the

96. *Id.*
97. *Id.*
98. WASH. CONST. art. I, § 7.
99. U.S. CONST. amend. IV.
100. *York*, 178 P.3d at 1000.
101. *Id.* at 1000-01.
102. *Id.* at 1001.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 1002.
108. *Id.* at 1003.

specific question was whether an existing exception to the warrant requirement applied, or, if not, whether Washington should adopt a "special needs" exception.[109] Although the court identified the short list of exceptions to the warrant requirement in Washington, none was relevant here.[110] Therefore, the School District urged the court to borrow from federal law and adopt an analog to the "special needs" exception.[111] After discussing the "special needs" exception under federal law and after reviewing relevant state cases, the court found no common law support for expanding warrant exceptions in Washington and declined to do so.[112] Perhaps responding to arguments in a concurring opinion, Justice Sanders closed the plurality opinion by attempting to reconcile its conclusion with prior cases upholding suspicionless searches under article I, section 7.[113]

The plurality opinion was a direct and straightforward analysis of a narrow legal question in light of the limited record presented. Justice Sanders did not wander far in one direction or another.

B. The Separate Concurrences

Three separate concurring opinions question Justice Sanders's reasoning.[114] In the first, Justice Madsen, joined by Justices Johnson, Fairhurst, and Bridge agreed that Policy 3515 was unconstitutional, but argued that, in certain circumstances, Washington courts should recognize the "special needs" exception to the warrant requirement.[115] These concurring justices argued that the exception is rooted in "well-established common law principles," and that the exception was first recognized by the U.S. Supreme Court in *New Jersey v. T.L.O.*[116] – a case citing favorably the view of the Washington Supreme Court.[117] While these justices would keep open the possibility of a "special needs" exception, they agreed that suspicionless tests by the Wahkiakum School District would not fit within the exception for several reasons.[118]

First, the concurring justices argued that, to support a suspicionless testing

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109. *Id.*

110. *Id.*

111. *Id.* at 1003-05.

112. *Id.* at 1005.

113. Id. at 1005-06.

114. *Id.* at 996.

115. *Id.* at 1006 (Madsen, J., concurring).

116. *Id.* at 1008; New Jersey v. T.L.O., 469 U.S. 325 (1985).

117. *See T.L.O.*, 469 U.S. at 332 (1985).

118. *York*, 178 P.3d at 1012 (Madsen, J., concurring).

program, the school must have shown that a program requiring individualized suspicion was unworkable.[119] They did not believe the Wahkiakum School District sustained its burden and noted that students are under almost constant surveillance.[120] As such, teachers, coaches, peers, and others are in a position to notice observable manifestations of drug or alcohol use.[121] Second, the concurring justices argued that the record lacked "evidence that drug use actually interfere[d] with the school's ability to maintain order, discipline and . . . safety."[122] Third, the concurring justices noted that there was no evidence showing that student-athletes accounted for a disproportionately high number of drug users.[123] Rather than their impact on the drug problem, student-athletes were selected for drug testing based only on their lower privacy expectation.[124] Finally, the concurring justices argued that balancing the relevant "interests at stake weigh[ed] against allowing suspicionless drug testing."[125] In weighing the respective interests, the concurring justices noted the strong privacy interest in students' excretory functions, the low probability that Policy 3515 would accomplish its goals and the low deterrence rate associated with random tests.[126]

Rejecting the School District's position regarding the dangers of student drug use, the concurring justices wrote that "the harm threatened by the unfair use of performance-enhancing drugs is simply not great enough to justify nonconsensual suspicionless drug testing."[127] Together with their question about whether "drug use actually interferes with the school's ability to maintain order, discipline, and student safety,"[128] one wonders if these concurring justices might have been moved to a different result with a more complete factual record. The answer is likely in the negative, given Justice Johnson's clear awareness (in the third concurring opinion) of the dangers surrounding doping by student-athletes.[129] Still the questions, rather than the result, leave observers wondering whether these concurring justices appreciate the gravity of doping in interscholastic athletics.

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119. *Id.* at 1007.
120. *Id.* at 1010.
121. *Id.* at 1010-11.
122. *Id.* at 1011.
123. Id.
124. Id.
125. *Id.*
126. *Id.* at 1011-12.
127. *Id.* at 1011, n.1.
128. *Id.* at 1011.
129. *See id.* at 1015, 1019 (Johnson, J., concurring).

The second concurrence consists only of a single paragraph by Justice Chambers.[130] In the short concurring opinion, he questioned whether the privacy interest in a student-athlete's urine, as recognized in this case, could be reconciled with recent precedent finding lesser privacy interest in saliva and DNA.[131] Other than finding the analysis "paradoxical" when compared with the analysis of other bodily fluids, Justice Chambers fully concurred in the result.[132]

In the third separate concurrence, Justice Johnson agreed with the result in the case at issue but opined that school drug testing programs could be upheld in certain circumstances.[133] Specifically, Justice Johnson argued that school-aged students generally, and student-athletes specifically, have privacy rights that are different and lower than adults.[134] By way of example, he discussed searches of student lockers and compulsory vaccinations.[135] Justice Johnson noted, however, that even students' privacy interest in bodily functions is significant.[136]

Interestingly, and unlike the other concurring justices, Justice Johnson also acknowledged the severe risks of drug or alcohol abuse by student-athletes.[137] In light of these dangers, he argued that schools have the authority and the responsibility to protect students.[138]

Justice Johnson then turned to an analysis of article I, section 7 and Washington search and seizure law.[139] In contrast to the plurality opinion, he found that Washington courts already recognize a "special needs" exception to the warrant requirement in certain limited circumstances.[140] Although the issue was not before the court, he opined that a drug test policy based on individualized suspicion would provide greater protection of constitutional rights and pass constitutional muster in Washington.[141] He also added that random suspicionless testing could, in his opinion, be constitutional.[142]

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130. *See id.* at 1012-13 (Chambers, J., concurring).

131. *Id.* at 1013.

132. *Id.*

133. *Id.* (Johnson, J., concurring).

134. *Id.* at 1013-15.

135. *Id.* at 1016.

136. *Id.* at 1015.

137. *Id.* at 1014, 1019.

138. Id. at 1015

139. *Id.* at 1015-16.

140. *Id.* at 1016.

141. *Id.* at 1018.

142. *Id.* at 1019.

"Under certain circumstances," he wrote, "the balance between the government's interest in suspicionless drug testing and student-athletes' privacy rights might weigh in favor of testing."[143] Those circumstances would require a drug testing program that is 1) designed to protect a compelling interest, 2) narrowly tailored to address the problem, and 3) minimally intrusive.[144] Because Justice Johnson did not believe Policy 3515 of the Wahkiakum School District satisfied those requirements, he joined the decision to strike the policy.[145]

V. WHAT DOES IT MEAN FOR OTHER STATES?

Although at first glance it might appear that the Washington Supreme Court's decision in *York* rejected clear precedent established by the U.S. Supreme Court, the *York* court's carefully reasoned decision reveals that this is not the case.[146] Rather, the *York* decision rested solely on an interpretation of the Constitution of Washington, which provides a significantly different level of protection than that provided by the Fourth Amendment of the U.S. Constitution.[147]

Where the Fourth Amendment protects United States citizens against "unreasonable searches and seizures"[148] by government officials, article I, section 7 of the Washington State Constitution protects Washington residents from such disturbances in their private affairs "without authority of law."[149] The somewhat subtle distinction between the federal and state constitutional provisions serves as the cornerstone for very different results to challenges against student drug testing policies, even policies that are similar in all aspects other than the location of the school district.

Although many believe the U.S. Supreme Court essentially granted permission for all public school districts to implement policies of random, suspicionless drug testing of students involved in interscholastic athletics or extracurricular activities, *York* reveals that the matter is not so simple after all.[150] Instead, *York* could provide support and authority for challenges to high school drug testing policies in states with constitutional provisions that, like article I, section 7 of the Washington Constitution, do not contain a

143. *Id.*
144. *Id.*
145. *Id.* at 1020-21.
146. *Id.* at 995.
147. *See generally id.*
148. U.S. CONST. amend. IV.
149. WASH. CONST. art. I, § 7.
150. *See generally York*, 178 P.3d 995.

reasonableness component to warrantless searches.[151]

A survey of the fifty states reveals that the vast majority of state constitutions include a reasonableness requirement for warrantless searches.[152] A handful of states, however, have constitutional provisions that could support successful challenges to a high school drug testing policy, which is not narrowly-tailored and carefully drafted.[153] Specifically, Arizona, Maryland, North Carolina, and Vermont[154] completely omitted any reference to reasonableness from their constitutional provisions regarding searches and seizures.

Additionally, several other states that include a reasonableness component in the relevant constitutional provision have common law doctrines that may provide greater protection from warrantless searches than that provided by the reasonableness standard built into the Fourth Amendment of the U.S. Constitution.[155] These states include, but are not necessarily limited to, Massachusetts, New Hampshire, South Carolina, and Tennessee.[156]

The Massachusetts Constitution, part 1, article XIV provides (in relevant part) that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person . . . ."[157] However, the remainder of the article provides broader protections than the Fourth Amendment.[158] Additionally, Massachusetts defines "unreasonable" pursuant to its own constitution rather than the U.S. Constitution.[159] Therefore, cases interpreting the reasonableness requirement of the Fourth Amendment may not apply in Massachusetts. For instance, the Massachusetts Supreme Court has twice invalidated drug testing in highly regulated industries, relying on the state's particular interpretation of reasonableness.[160]

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151. *See generally id.*

152. *State Constitutions*, USCONSTITUTION.NET, http://www.usconstitution.net/stateconst.html (last visited Sept. 28, 2008).

153. *Id.*

154. *See* ARIZ. CONST. art. II, § 8; MD. CONST. art. XXVI; N.C. CONST. art. I, § 20; VT. CONST. ch. I, art. 11.

155. *See* N.H. CONST. pt. 1, art. XIX; S.C. CONST. art. I, § 10; TENN. CONST. art. I, § 7.

156. *See* MASS. CONST. pt. 1, art. XIV; N.H. CONST. pt. 1, art. XIX; S.C. CONST. art. I, § 10; TENN. CONST. art. I, § 7.

157. MASS. CONST. pt. 1, art. XIV.

158. *See id.*

159. *See id.*

160. *See, e.g.*, Horsemen's Benevolent & Protective Ass'n, Inc. v. State Racing Comm'n, 532 N.E.2d 644, 652 (Mass. 1989) (applying state constitutional reasonableness standard to invalidate Act permitting drug testing in "highly regulated industry" of racing); Guiney v. Police Comm'r, 582 N.E.2d 523, 527 (Mass. 1991) (applying state constitutional reasonableness standard to invalidate urine drug testing for police officers because they have a reasonable expectation of privacy in the

Similarly, although the New Hampshire, South Carolina, and Tennessee state constitutions[161] protect their respective citizens against "unreasonable" searches, each state uses its own definition of reasonableness.[162] Therefore, high school drug testing policies in these states might also be more susceptible to invalidation on state constitutional grounds than in other states across the country.

VI. PROBLEMS PRESENTED WHEN CONSTITUTIONS CONFLICT

Although there is much to be said for a governmental system in which individual states are free to adopt legislation that differs from either that adopted by the federal government or that adopted by other states, the system can also create practical problems. With regard to student-athlete drug testing policies in public secondary schools, the system can undermine the desire of individual states and school districts to promote academics over athletics, protect student-athletes from exploitation, and maintain competitive equity.

Specifically, as recognized by the Supreme Court in *Acton* and *Earls*, school districts have a "custodial and tutelary responsibility for children."[163] As part of this responsibility, school districts are permitted to implement suspicionless drug testing policies to protect students from the dangers of illegal drug use.[164] According to the Supreme Court, these dangers include, but are not limited to, increased risk of injury, disengagement from school and social activities, and a decline in academic success.[165] However, as discussed by the *York* court and in the section above, public secondary schools in Washington (and possibly a handful of other states) are, absent protections not yet tested, prohibited from attempting to fulfill their custodial responsibilities by enacting policies that utilize random drug testing of student-athletes.[166] This can lead to vastly different treatment of student-athletes in one state as compared to another.

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contents of their urine).

161. *See* N.H. CONST. pt. 1, art. XIX; S.C. CONST. art. I, § 10; TENN. CONST. art. I, § 7.

162. *See, e.g.*, State v. Leiper, 761 A.2d 458, 461 (N.H. 2000) (stating that the state constitution provides "*at least as much* protection as the Federal Constitution" (emphasis added)); State v. Forrester, 541 S.E.2d 837, 841 (S.C. 2001) (holding that the people of South Carolina intended for their Constitution to provide "a higher level of" protection than that provided by the U.S. Constitution); State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (recognizing that the state constitution may provide Tennessee citizens with greater protection than the Federal Constitution).

163. Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 656 (1995); Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002).

164. *See id.*

165. *Acton*, 515 U.S. at 661-62.

166. *See generally* York v. Wahkiakum Sch. Dist., 178 P.3d 995 (Wash. 2008).

It is well settled that subjecting the competition rules to multiple local regulations may seriously compromise interstate competitions. Generally speaking, drug testing policies at public secondary schools are created to deter drug use among students, particularly student-athletes. Therefore, a practical and intended effect of the policy is to prevent student-athletes from using illegal or performance-enhancing drugs. If such a policy is adopted by several districts within a state, or by all members of a high school athletic association, a secondary practical effect is the promotion of competitive equity. On the other hand, if districts and states apply different policies, competitive equity may be undermined.

As determined by the *York* court, public secondary schools in the State of Washington cannot institute a suspicionless drug testing policy without running afoul of the state constitution.[167] On the other hand, the *Acton* court has made clear that, just across the border in Oregon, public school districts can institute suspicionless drug testing policies.[168] Assuming that a drug testing policy has its intended effect of deterring drug use by student-athletes, student-athletes in Oregon school districts with an anti-doping policy are less likely to use drugs than those in Washington school districts that are precluded from implementing a similar policy. As a result, and by way of a hypothetical example, if a high school team from the Vernonia School District travels across the border into Washington to play the Wahkiakum School District's high school team, competitive equity between the teams is compromised because the players are subjected to two entirely different sets of rules regarding the use of illegal drugs.

Specifically, whether any Wahkiakum student-athletes used performance-enhancing or otherwise illegal drugs would likely be unknown because they cannot be randomly tested.[169] However, following the Supreme Court's reasoning, the Wahkiakum student-athletes would be more likely to have used drugs than the Vernonia student-athletes who are deterred from doing so based on the threat of drug testing at virtually any moment. Carrying the argument one step farther, drugs used by the Wahkiakum student-athletes may give them a significant competitive advantage over their counterparts from the Vernonia School District and may pose a greater risk of harm to the Vernonia student-athletes who are not competing while under the effects of any drugs.

The potential problem is highlighted by these cases, but it is not limited to two school districts near the Washington-Oregon boundary. The problem is broader and, in fact, extends beyond the playing field, diamond, court, course,

167. *See id.* at 1001-03, 1006.

168. *See generally Acton*, 515 U.S. 646.

169. *See generally York*, 178 P.3d 995.

track, pitch, or pool. For example, a secondary school student-athlete doping in the State of Washington will likely compete in athletics throughout high school unless he or she otherwise violates applicable eligibility rules. A similarly-situated student-athlete in Oregon, however, may be declared at least temporarily ineligible as a result of the same decision to abuse performance-enhancing drugs. To the extent athletics are important in secondary education (although obviously not a property right), a student-athlete in one state participates undetected, while another in a neighboring state sits in street clothes on the bleachers. And to the extent high school student-athletes are competing for attention and scholarships from colleges or universities, the playing field is not level when some are subject to random testing and others are not.

Disuniformity is an unintended but very real side effect of having different constitutional protections between and among the various states. It hardly seems, however, that the entire structure of the American government should be rewritten to eliminate this type of disparity. Indeed, is the freedom of states to legislate not part of what makes America great?

VII. WHERE DO WE GO FROM HERE?

Parts of secondary education nationwide are governed by uniform federal authorities. For example, as recipients of federal funds and as political subdivisions of the state, public schools are subject to U.S. Department of Education regulations,[170] federal discrimination laws,[171] federal confidentiality laws,[172] federal performance standards,[173] and, of course, requirements of the U.S. Constitution. In addition, access to certain funding dollars for special education is conditioned on providing services and procedural safeguards to students with disabilities.[174] This extensive federal regulation notwithstanding, much of everyday life in secondary schools is governed by state, local, and district authority. Therefore, schools and students are accustomed to different policies, curricula, and mandates between and among the states. In other words, in the educational context, secondary schools in neighboring states do not enjoy or expect consistency in many areas. Even school districts within a single state operate under materially

170. *See* 34 C.F.R. §§ 74-86, 97-99 (2007).

171. *See* The Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-e et seq. (2006); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006); The Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2006); 34 C.F.R. § 104 (2007).

172. 20 U.S.C. § 1232g (2006).

173. 20 U.S.C. § 6301 et seq. (2006).

174. 20 U.S.C. § 1400 et seq. (2006).

different policies and procedures.

While lack of uniformity is the norm in the educational context, it is not so in the athletic context. Rules of competition are largely consistent nationally. Rules governing eligibility, transfers, and recruiting of high school student-athletes are generally governed by state-wide athletic associations, each bearing a striking resemblance to the other. Even the state-wide associations have a degree of centralization through the National Federation of State High School Associations.

Consistency in athletic rules and inconsistency in education may not make good public policy, but it is a general reality. Assuming that general consistency in athletics, or at least rules governing secondary athletics, is beneficial to student-athletes and society, can and should the United States move toward uniformity and consistency with regard to anti-doping efforts in secondary schools? These are obviously separate questions, and only the first will be addressed here.

One means to uniformity is legislative intervention by Congress; however, several fatal problems with this remedy are apparent. First, as highlighted by *York* and the discussion above, some states have, in essence, "occupied the field" with constitutional protections which reach further than the Fourth Amendment, making viable legislation nearly impossible to draft.[175] Second, federal anti-doping legislation governing secondary schools is probably not politically feasible. Indeed, past efforts to federalize the issue have failed.[176] Not only are constitutions arguably in conflict, so are representatives from individual states. Third, unless Congress also earmarks many millions of dollars to support drug tests and enforcement requirements, federal legislation would likely run afoul of the Constitution as an unfunded mandate.[177] In any event, congressional attention to doping is normally targeted toward professional sports.

Rather than creating a controversial unfunded mandate, another option would be for Congress to make federal money available to states that satisfy certain uniform drug testing standards. Like legislative requirements, this incentive option has significant flaws, and until doping in secondary schools reaches a fever pitch, Congress is unlikely to direct substantial money to secondary schools for purely athletic, rather than educational, purposes. Instead, as the Office of National Drug Control Policy has already demonstrated, the government is willing to make grant money available to

175. *See* York v. Wahkiakum Sch. Dist., 178 P.3d 995 (Wash. 2008).

176. *See, e.g.*, Empowering Parents to Fight Drugs Act of 1999, H.R. 1735, 106th Cong. (1999); Parental Consent Drug Testing and Counseling Act, H.R. 1642, 106th Cong. (1999).

177. *See* U.S. CONST. amend. X.

those schools that elect to drug test student-athletes engaged in extracurricular activities.[178] Nevertheless, while grant money may encourage drug prevention and drug testing programs, it is not designed to legislate consistency.

There are obviously countless and firmly-held opinions regarding the best strategy for addressing doping in secondary schools. Political leaders, individual states, discrete boards of education, and even co-authors of an academic article cannot agree about appropriate doping solutions. Accordingly, for these and many other reasons, regulation of doping in secondary schools is and must be either a state or local matter. In fact, the state and local level is exactly where current anti-doping efforts are occurring. To date, we have seen state legislatures, state activity associations, and local school boards wrestle with strategies for ridding secondary sports of performance-enhancing substances. In addition to the drug testing policies challenged in *Acton*, *Earls*, and *York*, hundreds of public school districts have opted to begin drug testing student-athletes.[179] Furthermore, New Jersey,[180] Florida,[181] Texas,[182] and Illinois[183] have explored and adopted state-wide standards prohibiting the use of performance enhancing substances by secondary student-athletes. Although similar efforts have failed in other states, such as Missouri, the trend toward state-wide standards is expected to continue. Other states are expected to take a "wait and see" approach as these pilot programs evolve.

State and local authorities are in the best position to understand regional circumstances, craft effective testing procedures, and, perhaps most importantly, assure compliance with the various state constitutional provisions. Obviously, not all states and not all school districts will move in

178. NATIONAL DRUG CONTROL STRATEGY, THE WHITE HOUSE 13 (2003), *available at* http://www.whitehousedrug policy.gov/publications/pdf/strategy2003.pdf.

179. *See generally* Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); *York*, 178 P.3d 995.

180. N.J. STATE INTERSCHOLASTIC ATHLETIC ASS'N, STEROID TESTING POLICY (2006), *available at* http://www .njsiaa.org/NJSIAA/06steroidmemo.pdf (developed in accordance with Executive Order 72 issued by the Governor of New Jersey on December 20, 2005).

181. FLA. HIGH SCH. ATHLETIC ASS'N, *Policy 33, Policy on the Use of Alcohol, Tobacco and Other Substances*, 2008-09 FHSAA HANDBOOK 161, *available at* http://www.fhsaa.org/rules/handbook/0809_handbook3.pdf (last visited Aug. 12, 2008).

182. UNIV. INTERSCHOLASTIC LEAGUE, ANABOLIC STEROID TESTING PROGRAM (2007), *available at* http://www.uil.utexas.edu/athletics/health/steroid_information.html (mandated by Senate Bill 8, passed by the 80th Texas Legislature, signed by the governor and effective June 15, 2007).

183. ILL. HIGH SCH. ASS'N, *Policy 24, Performance-Enhancing Drug Testing Policy*, 2008-09 IHSA HANDBOOK 100 *available at* http://www.ihsa.org/org/policy/2008-09/policies.pdf (last visited Aug. 12, 2008).

the direction of testing student-athletes, and those that do so will no doubt choose very different paths. Some state officials and school board members who elect to march in that direction will, like the Wahkiakum School District, find their efforts challenged in court. Those officials and elected leaders, however, are not without judicial guidance. While complete uniformity cannot be possible and is probably unnecessary, *York* and each new court decision provides policy drafters across the country with guidance helpful in crafting a constitutional policy for detecting and punishing users of performance enhancing drugs.[184]

VIII. CONCLUSION

The *York* decision directly impacts the ability of public school districts in the State of Washington to develop and implement random, suspicionless student-athlete drug testing policies. In light of the precise and unique language of the Washington Constitution, the technical legal impact of the *York* decision will likely be limited to a relatively small number of states. The decision, however, highlights the problems encountered by states or public secondary schools attempting to curb use or abuse of performance-enhancing substances. It also highlights the difficulty in finding a consistent strategy between and among the states for tackling the doping problem in secondary athletics. Finally, it illustrates the limited application the Fourth Amendment may have in determining these difficult issues.

184. *See* York v. Wahkiakum Sch. Dist., 178 P.3d 995 (Wash. 2008).